

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 20 September 2007<sup>1</sup>

**I — Introduction**

1. In Finland and Sweden, measures such as taking children into care and their placement in a foster family or a home which are taken to protect children by the authorities against the will of the parents are regarded as public law acts. Such measures may be challenged in the administrative courts. The Nordic States cooperate in administrative matters, so that children can be transferred from one State to another in the enforcement of such decisions on parental responsibility without any formalities.
2. In the main proceedings, Ms C is appealing against the transfer of her two children, which has already been carried out, by the Finnish authorities to the Swedish authorities, who had ordered the children to be taken into care and placed in Sweden, where the family used to be resident.
3. By the present reference, the Korkein Hallinto-oikeus (Finland's Supreme Administrative Court, which is hearing the case) asks whether Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000,<sup>2</sup> is applicable to the recognition and enforcement of this decision on taking into care and placement. If so, then in Finland it would not be the administrative courts but the ordinary courts that would have jurisdiction. In addition, the Regulation's procedural provisions would take precedence over the national provisions applicable within the framework of administrative cooperation.
4. The answer depends primarily on whether the term 'civil matters' in Article 1 of the Regulation includes cases such as the present, which, under national law, are classified as a public law dispute.

1 — Original language: German.

2 — OJ 2003 L 338, p. 1 — also called the Brussels IIa Regulation.

## II — Legal framework

in the present case on decisions in matters of parental responsibility:

### A — Community law

5. In the Final Act of the Treaty on the Accession of Austria, Finland and Sweden, the Contracting Parties made the following Declaration No 28 on Nordic Cooperation:<sup>3</sup>

(5) In order to ensure equality for all children, this Regulation covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding.

‘The Contracting Parties record that Sweden, Finland and Norway, as members of the European Union, intend to continue, in full compliance with Community law and the other provisions of the Treaty on European Union, Nordic Cooperation amongst themselves as well as with other countries and territories.’

...

6. Recitals 5 and 10 in the preamble to Regulation No 2201/2003 give the following reasons for the provisions which are relevant

(10) This Regulation is not intended to apply to matters relating to social security, public measures of a general nature in matters of education or health or to decisions on the right of asylum and on immigration. In addition it does not apply to the establishment of parent-hood, since this is a different matter from the attribution of parental responsibility, nor to other questions linked to the status of persons. Moreover, it does not apply to measures taken as a result of criminal offences committed by children.’

<sup>3</sup> — Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, Final Act — III. Other Declarations — E. Joint Declarations: The present Member States/Various new Member States — 28. Joint Declaration on Nordic Cooperation (OJ 1994 C 241, p. 392).

7. The following extracts from provisions of Regulation No 2201/2003 are relevant to the present case:

*‘Article 1*

Scope

1. This Regulation shall apply, whatever the nature of the court or tribunal, in civil matters relating to:

...

(b) the attribution, exercise, delegation, restriction or termination of parental responsibility.

2. The matters referred to in paragraph 1(b) may, in particular, deal with:

(a) rights of custody and rights of access;

(b) guardianship, curatorship and similar institutions;

(c) the designation and functions of any person or body having charge of the child’s person or property, representing or assisting the child;

(d) the placement of the child in a foster family or in institutional care;

(e) measures for the protection of the child relating to the administration, conservation or disposal of the child’s property.

3. This Regulation shall not apply to:

(a) the establishment or contesting of a parent-child relationship;

(b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;

- (c) the name and forenames of the child; ...
- (d) emancipation; 7. the term “parental responsibility” shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access;
- (e) maintenance obligations;
- (f) trusts or succession; ...
- (g) measures taken as a result of criminal offences committed by children.’ 9. the term “rights of custody” shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child’s place of residence;

‘Article 2 ...’

‘Article 8

Definitions

General jurisdiction

For the purposes of this Regulation:

1. the term “court” shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1; ...’
1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.

*'Article 16*

*'Article 21*

Seising of a court

Recognition of a judgment

1. A court shall be deemed to be seised:

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

- (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent;

...

or

- (b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.'

3. Without prejudice to Section 4 of this Chapter, any interested party may, in accordance with the procedures provided for in Section 2 of this Chapter, apply for a decision that the judgment be or not be recognised. The local jurisdiction of the court appearing in the list notified by each Member State to the Commission pursuant to Article 68 shall be determined by the internal law of the Member State in which proceedings for recognition or non-recognition are brought.

...'

*'Article 28*

## Enforceable judgments

1. A judgment on the exercise of parental responsibility in respect of a child given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

...'

*'Article 29*

## Jurisdiction of local courts

1. An application for a declaration of enforceability shall be submitted to the court appearing in the list notified by each Member State to the Commission pursuant to Article 68.

...'

*'Article 59*

## Relation with other instruments

1. Subject to the provisions of Articles 60, 63, 64 and paragraph 2 of this Article, this Regulation shall, for the Member States, supersede conventions existing at the time of entry into force of this Regulation which have been concluded between two or more Member States and relate to matters governed by this Regulation.

2.(a) Finland and Sweden shall have the option of declaring that the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden comprising international private law provisions on marriage, adoption and guardianship, together with the Final Protocol thereto, will apply, in whole or in part, in their mutual relations, in place of the rules of this Regulation. Such declarations shall be annexed to this Regulation and published in the *Official Journal of the European Union*. They may be withdrawn, in whole or in part, at any moment by the said Member States.

...'

*'Article 64*

1. The provisions of this Regulation shall apply only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to agreements concluded between the parties after its date of application in accordance with Article 72.

2. Judgments given after the date of application of this Regulation in proceedings instituted before that date but after the date of entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation if jurisdiction was founded on rules which accorded with those provided for either in Chapter II or in Regulation (EC) No 1347/2000 or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

...'

*'Article 72*

Entry into force

This Regulation shall enter into force on 1 August 2004.

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The Regulation shall apply from 1 March 2005, with the exception of Articles 67, 68, 69 and 70, which shall apply from 1 August 2004.'

8. In the list notified pursuant to Article 68 of Regulation No 2201/2003,<sup>4</sup> to which Articles 21(3) and 29(1) refer, the court in Finland having jurisdiction over the recognition and enforcement of decisions of the authorities of another Member State is identified as the Käräjäoikeus/Tingsrätt (District Court).

B — *National law*

1. Finnish law

9. The Lastensuojelulaki (Finnish Law for the protection of children) (683/1983) provides that the District Social Welfare Board may provide assistance without delay where there is a risk to the welfare of a child. Decisions relating to taking into care and placement for the purpose of care outside the family may also include such measures. Where a child is taken into care against the

<sup>4</sup> — OJ 2005 C 40, p. 2.

will of its parents, this is subject to ratification by the Hallinto-oikeus (the Administrative Court) (Finland). The taking into care can be challenged before the Hallinto-oikeus, and thereafter again before the Korkein Hallinto-oikeus.

it is the most appropriate option for providing the person concerned with care or treatment in that State. A decision taken under this Law may be challenged before the Hallinto-oikeus under the first subparagraph of Paragraph 11 of the Law, and on appeal may be brought against the latter's decision to the Korkein Hallinto-oikeus.

10. Paragraph 1(1) of the Law (761/1970) on handing over persons to Iceland, Norway, Sweden or Denmark for the enforcement of a decision on taking into care or treatment provides that any person subject to a care or treatment measure pursuant to a decision of the authorities in Iceland, Norway, Sweden or Denmark may, on request with a view to its enforcement, be transferred under this Law from Finland to the State concerned. Law 761/1970 is based on agreements between the Nordic countries which, however, were not entered into a form that is binding in international law.

12. Paragraph 1 of Law (1153/2004) of 21 December 2004 on the application of Regulation No 2201/2003 lays down additional provisions for applying the regulation in Finland. Under the first subparagraph of Paragraph 2 of the Law, the court having jurisdiction within the meaning of Article 21(3) and Article 29(1) of Regulation No 2201/2003 in Finland is the Käräjäoikeus (District Court).

11. Under Paragraph 2 of Law 761/1970, consent can only be given for a transfer if the request is based on a decision under certain provisions in the State in question, including provisions concerning assistance to children and young people, if the person who is to be transferred is ordered, under the decision, to be taken into or kept in an institution, or to reside in a place specially assigned to him or her, and if the decision is enforceable in the State in which it was issued. Under Paragraph 3 of the Law, further conditions of the handing over of a Finnish national are that he or she has a place of domicile in the State in which the decision was made, the decision applies to taking into care or treatment, and

## 2. Swedish law

13. The Swedish Care of Young Persons (Special Provisions) Act (1990:52) (lag med särskilda bestämmelser om vård av unga) lays down measures for protecting children such as taking them into care and their placement against the will of their parents. It provides that, if the welfare of the child is at risk, the Social Welfare Board of the



municipality can apply to the Länsrätt (County Administrative Court) (Sweden) to adopt such measures. In urgent cases the Social Welfare Board can initially order protective measures itself, but these require subsequent confirmation by the Länsrätt. A protective measure under Law 1990:52 does not involve the complete withdrawal of parental rights.

### III — Facts and questions referred

14. Ms C, the claimant and appellant in the main proceedings, is the mother of two minor children, both of whom have Finnish nationality and one of whom also has Swedish nationality. Initially, the claimant lived with her husband and the children in Sweden. On the basis of investigations which the Swedish social services initiated in autumn 2004, on 23 February 2005 the Social Welfare Board of the municipality in which the family lived ordered that the two children be taken into care and placed in a foster family immediately. On 25 February 2005 the Social Welfare Board submitted its decision that the children be taken into care immediately to the Länsrätt, which confirmed the decision on 3 March 2005. Ms C's appeals against the Länsrätt's decision were unsuccessful. In particular, the Regeringsrätt (Supreme Administrative Court, Sweden) confirmed finally that the Swedish courts had jurisdiction.

15. However, the claimant had already moved with her children to Finland, on 1 March 2005, and on 2 March 2005 had registered herself there. On 10 March 2005 the Finnish registration authorities entered the change of residence in the register, with retroactive effect from 1 March 2005.

16. On 3 March 2005 the Swedish police asked the Finnish police at the children's new place of residence in Finland for cooperation in the enforcement of the decision. By notice dated 8 March 2005 the police station to which the request had been made ordered that the children be taken into care and handed over to the Swedish social authorities.

17. Following an unsuccessful application to the Hallinto-oikeus against the enforcement of the measures by the Finnish authorities, Ms C appealed to the Korkein Hallinto-oikeus. She applied for the decision of the Hallinto-oikeus and the police notice to be set aside and for both children to be returned to Finland. By order dated 13 October 2006 the Korkein Hallinto-oikeus referred the following questions for a preliminary ruling under Article 234 EC and Article 68 EC:

'(1) (a) Does Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial

- matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ... apply, in a case such as the present, to the enforcement of a public law decision in connection with child welfare, relating to the immediate taking into care of a child and his or her placement in a foster family outside the home, taken as a single decision, in its entirety;
- (b) or solely to that part of the decision relating to placement outside the home in a foster family, having regard to the provision in Article 1(2)(d) of the regulation;
- (c) and, in the latter case, is Regulation No 2201/2003 applicable to a decision on placement contained in one on taking into care, even if the latter decision, on which the placement decision is dependent, is itself subject to legislation, based on the mutual recognition and enforcement of judgments and administrative decisions, that has been harmonised in cooperation between the Member States concerned?
- (2) If the answer to Question 1(a) is in the affirmative, is it possible, given that the regulation takes no account of the legislation harmonised by the Nordic Council on the recognition and enforcement of public law decisions on placement, as described above, but solely of a corresponding private law convention, nevertheless to apply this harmonised legislation based on the direct recognition and enforcement of administrative decisions as a form of cooperation between administrative authorities to the taking into care of a child?
- (3) If the answer to Question 1(a) is in the affirmative and that to Question 2 is in the negative, does Regulation No 2201/2003 apply *ratio temporis* to a case, taking account of Articles 72 and 64(2) of the regulation and the above-mentioned harmonised Nordic legislation on public law decisions on taking into care, if in Sweden the administrative authorities took their decision both on immediate taking into care and on placement with a foster family on 23 February 2005 and submitted their decision on immediate taking into care to the Länsrätt for confirmation on 25 February 2005, and that court accordingly confirmed the decision on 3 March 2005?

18. In the proceedings before the Court of Justice the German Government, the French Government, the Netherlands Government, the Slovakian Government, the Finnish Government, the Swedish Government and the Commission of the European Communities submitted written observations.

measures were not civil matters but were, instead, public law measures. All the other participants in the proceedings, including the Finnish Government, regarded the regulation as applicable, and emphasised that the term ‘civil matters’ has an autonomous meaning under Community law. For that reason, the fact that in a Member State a case fell under public law did not preclude application of the regulation.

#### IV — Legal assessment

##### A — *The first question*

19. By its first question the national court wishes to know whether Regulation No 2201/2003 applies to *the whole of* an authority’s decision ordering the taking of children into care and their placement outside their own family (Question 1(a)) or only to the part of the decision ordering their placement (Question 1(b)). Question 1(c) seeks clarification of the consequences for application of the regulation to the decision on placement, if the regulation applies only to that decision and not to the closely-related decision on taking into care.

21. Article 1(1)(b) of Regulation No 2201/2003 provides that the regulation is to apply, whatever the nature of the court or tribunal, in civil matters relating to the attribution, exercise, delegation, restriction or termination of parental responsibility. Accordingly, what must be considered is, first, whether the taking of children into care and their placement by State authorities are to be regarded as measures relating to parental responsibility. Second, it is necessary to decide whether these are civil matters.

1. Measures relating to parental responsibility

20. Only the Swedish Government submitted that the regulation is not applicable at all, on the ground that the disputed

22. Parental responsibility is a central concept for determining the substantive scope of application of Regulation No 2201/2003. Article 2(7) defines it as all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or

by an agreement having legal effect. Parental responsibility includes in particular rights of custody and rights of access. Article 2(9) provides that 'rights of custody' include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence.

23. The abstract definition in Article 1(1)(b) of Regulation No 2201/2003 of decisions which fall within the regulation's scope of application is made specific by two lists of categories in Article 1(2) and (3). Article 1(2) lists matters and measures to which the regulation applies. This list is not exhaustive, as is apparent from the words 'in particular' at the start.<sup>5</sup> By contrast, Article 1(3) is an exhaustive list of various matters which are excluded from the regulation's scope of application.

24. Article 1(2)(d) provides that the placement of a child in a foster family or in institutional care is a civil matter which falls within the regulation's scope of application.

5 — See the Practice Guide for the application of the new Brussels II Regulation, drawn up by the Commission services in consultation with the European Judicial Network in civil and commercial matters (updated on 1 June 2005), p. 9. Available at [http://ec.europa.eu/justice\\_home/doc\\_centre/civil/doc/parental\\_resp\\_ec\\_vdm\\_en.pdf](http://ec.europa.eu/justice_home/doc_centre/civil/doc/parental_resp_ec_vdm_en.pdf).

25. By contrast, Article 1(2) does not expressly refer to taking a child into care. However, with the exception of Sweden, the Member States who participated in the proceedings are of the view that taking a child into care is a decision concerning parental responsibility which the regulation requires to be recognised and enforced. On the other hand, the Commission regarded taking a child into care as merely an enforcement measure which served to implement placement. According to Article 47(1) of the regulation, the enforcement procedure is to be governed solely by the law of the Member State of enforcement.

26. The ultimate determination as to how taking a child into care is to be characterised is for the national court. By contrast with the Commission, in the order for reference the national court clearly proceeds on the footing that taking a child into care and placement are two separate measures — even if combined in a single notice — which may even be recognised or enforced independently of one another.

27. If it is right that the taking into care is the decision to be enforced, then, subject to the question yet to be considered as to whether it is to be classified as a civil matter, its recognition and enforcement depend on Regulation No 2201/2003. As the German Government correctly submitted, this State measure deprives the parents of the possibility of exercising their rights of custody

within the meaning of Article 2(9). They are no longer able by themselves to attend to the rights and duties relating to the care of the person of the child, and in particular the right to determine the child's place of residence. Thus, in the same way as placement, taking a child into care is to be classified as a measure which affects rights of custody and thus parental responsibility.

28. Moreover, as the German and French Governments rightly emphasise, taking children into care and placement are closely linked, so that in most legal systems they do not even constitute separate decisions. On its own, taking into care can be at most an interim measure. In general, however, it is a measure ancillary to the placement of a child in a foster family or an institution. Likewise, the placement of a child against the will of his parents can be carried out only if the authorities first take the child into care. Thus, significant practical difficulties would arise if the regulation's scope of application included only placement and not taking into care. Thus, for example, different courts could have jurisdiction for ordering these two, closely related measures, if jurisdiction depended partly on national law and partly on Regulation No 2201/2003.

29. However, according to the Swedish Government, protective measures taken by the State are not measures concerning parental responsibility, because they are taken in the public interest and do not result in rights of custody being transferred to the authorities.

30. It follows from Article 1(1)(b) that a broad concept of decisions concerning parental responsibility underlies Regulation No 2201/2003. It applies not only to the delegation or termination of parental responsibility but also to measures which affect its exercise. Even if, under Swedish law, taking a child into care and its placement do not mean that parents formally lose their custody rights, they cease to be able to exercise significant aspects of them.

31. The judgment of the International Court of Justice in the case of *The Netherlands v Sweden (Boll)*,<sup>6</sup> to which the Swedish Government refers, does not indicate a different conclusion. That decision concerned the interpretation of the Hague Convention governing the Guardianship of Infants of 1902. In its judgment, the International Court of Justice held that a State which, according to the Convention, does not have jurisdiction in relation to guardianship is none the less not prevented from taking measures to protect the child. It cannot be inferred from that interpretation of guardianship under the Hague Convention of 1902 that the much broader concept of parental responsibility within the meaning of Regulation No 2201/2003 is also not affected by protective measures taken by the State.

6 — I.C.J. Reports 1958, p. 55.

32. Thus, taking a child into care and placement are decisions which relate to parental responsibility.

civil matters, because they are ordered by the authorities in the exercise of their public powers.

## 2. Civil matters

33. However, there is a question whether such protective measures are also civil matters within the meaning of Regulation No 2201/2003. All of the participants agree that this is an autonomous concept of Community law and in that regard refer to the Court's consistent case-law on the term 'civil and commercial matters' for the purposes of the Brussels Convention.<sup>7</sup>

(a) Case-law on the term 'civil and commercial matters' within the meaning of the Brussels Convention

34. However, according to the Swedish Government, protective measures taken by the State such as taking into care and placement — even on the autonomous Community law interpretation — are not

35. The case-law on the term 'civil and commercial matters' for the purposes of the Brussels Convention commenced with *LTU v Eurocontrol*.<sup>8</sup> Most recently, the Court gave the following summary in its judgment in *Lechouritou*:<sup>9</sup>

'It is to be remembered that, in order to ensure, as far as possible, that the rights and obligations which derive from the Brussels Convention for the Contracting States and the persons to whom it applies are equal and uniform, the terms of that provision should not be interpreted as a mere reference to the internal law of one or other of the States concerned. It is thus clear from the Court's settled case-law that "civil and commercial

<sup>7</sup> — Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and — amended version — p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1) ('the Brussels Convention').

<sup>8</sup> — Case 29/76 *LTU v Eurocontrol* [1976] ECR 1541.

<sup>9</sup> — Case C-292/05 *Lechouritou* [2007] ECR I-1519, paragraphs 29 to 31.

matters” must be regarded as an independent concept to be interpreted by referring, first, to the objectives and scheme of the Brussels Convention and, second, to the general principles which stem from the corpus of the national legal systems ...<sup>[10]</sup>

According to the Court, that interpretation results in the exclusion of certain legal actions and judicial decisions from the scope of the Brussels Convention, by reason either of the legal relationships between the parties to the action or of the subject-matter of the action ...<sup>[11]</sup>

Thus, the Court has held that, although certain actions between a public authority and a person governed by private law may come within the scope of the Brussels Convention, it is otherwise where the public authority is acting in the exercise of its public powers ...<sup>12</sup>

10 — The Court referred to Case 29/76 *LTU* (cited above, footnote 8), paragraphs 3 and 5; Case 814/79 *Netherlands v Ruffer* [1980] ECR 3807, paragraph 7; Case C-271/00 *Baten* [2002] ECR I-10489, paragraph 28; Case C-266/01 *Préservatrice foncière TIARD* [2003] ECR I-4867, paragraph 20; and Case C-343/04 *ČEZ* [2006] ECR I-4557, paragraph 22.

11 — The Court referred to *LTU* (cited above, footnote 8), paragraph 4; *Ruffer* (cited above, footnote 10), paragraph 14; *Baten* (cited above, footnote 10), paragraph 29; *Préservatrice foncière TIARD* (cited above, footnote 10), paragraph 21; *ČEZ* (cited above, footnote 10), paragraph 22; and Case C-167/00 *Henkel* [2002] ECR I-8111, paragraph 29.

12 — The Court referred to *LTU* (cited above, footnote 8), paragraph 4; *Ruffer* (cited above, footnote 10), paragraph 8; *Henkel* (cited above, footnote 11), paragraph 26; *Baten* (cited above, footnote 10), paragraph 30; *Préservatrice foncière TIARD* (cited above, footnote 10), paragraph 22; and Case C-172/91 *Sonntag* [1993] ECR I-1963, paragraph 20.

36. The same need for a uniform interpretation exists in relation to Regulation No 2201/2003 as in relation to the Brussels Convention. In this case too it can be ensured only by an autonomous interpretation of the term ‘civil matter’. However, that is not to say that the term ‘civil matter’ has the same meaning in both these legal instruments.

37. However, this is what the Swedish Government assumes, in that it wanted to apply the distinction between civil matters and public-law matters made by the Court in the case-law cited above on the Brussels Convention to the term ‘civil matters’ for the purposes of Regulation No 2201/2003. Using that approach there was no civil matter in the present case, because the Social Welfare Board acted in the exercise of its public powers when ordering that the children be taken into care and placed, and obtaining ratification of the taking into care from the Länsrätt.

38. That cannot be accepted. In its judgments on the Brussels Convention, the Court has always emphasised that the autonomous interpretation of the term ‘civil and commercial matters’ takes into account the objectives and scheme of the *Brussels Convention* and the general principles which stem from the corpus of the national legal systems.<sup>13</sup> However, its objectives and

13 — See the case-law cited above, footnote 10.

scheme and — I would add — its history are not necessarily the same as the objectives, scheme and history of Regulation No 2201/2003. In the sphere of parental responsibility it is also possible that different general principles exist from those applicable in the national legal systems in relation to disputes within the scope of application of the Brussels Convention. Instead, the term ‘civil matters’ in Regulation No 2201/2003 must be interpreted independently within the legislative context of this Regulation.

order of the authorities acting within the framework of their public supervisory role. In addition, the list in Article 1(2) defines specific measures and areas of regulation which are generally protective measures taken by the State as civil matters for the purposes of the regulation. For example, Article 1(2)(d) refers to the placement of the child in a foster family or in institutional care, and this is usually done at the instance of the State where the welfare of the child would be endangered if he remained with his own family. In addition, letter (e) refers to measures for the protection of the child relating to the administration, conservation or disposal of the child’s property.

(b) The term ‘civil matters’ within the legislative context of Regulation No 2201/2003

39. Regulation No 2201/2003 does not define the term ‘civil matters’ expressly. However, from the wording of Article 1(1) one can infer first of all that classification as a civil matter does not depend on which branch of the court system has jurisdiction for the dispute. The only thing that matters is how the subject-matter of the proceedings is classified according to substantive law.<sup>14</sup>

41. If one regarded these measures identified expressly in the list of civil matters as not being civil matters if arising between, on the one hand, private individuals (the parents) and, on the other, an authority exercising its public power, then the reference to those measures would largely lose its purpose. Accordingly, the distinction developed in the context of the Brussels Convention, according to whether the State is acting in exercise of its public or fiscal powers, cannot be applied to Regulation No 2201/2003.

40. Moreover, according to Article 1(1)(b) Regulation No 2201/2003 applies inter alia to restriction or termination of parental responsibility, and this is most usually effected by

42. The purpose of Regulation No 2201/2003, as expressed in its fifth recital, also supports including protective measures taken by the State within the regulation’s scope of application. It states that in order to ensure equality for all children the regulation

14 — See M. Busch and U. Rölke, ‘Europäisches Kinderschutzrecht mit offenen Fragen — Die neue EU-Verordnung Brüssel IIa zur elterlichen Verantwortung aus der Sicht der Jugendhilfe’, *Zeitschrift für das gesamte Familienrecht (FamRZ)* 2004, 1338, at p. 1340.



should cover all decisions on parental responsibility, *including measures for the protection of the child*. It follows that the term ‘civil matters’ must be given a broad interpretation which avoids problems of definition in individual cases. Most of all this enables the court which has jurisdiction under the provisions of Regulation No 2201/2003 to be clearly identified.

43. In this connection, in the context of Regulation No 2201/2003 regard must be had to the close connection between the term ‘civil matters’ and the concept of parental responsibility which is central to the Regulation. In most legal systems the corresponding provisions regarding the legal relationship between parents and child form a central part of civil law. Every decision which affects parental responsibility, that is, which affects this civil-law relationship,<sup>15</sup> should fall within the regulation’s scope of application, provided none of the exceptions in Article 1(3) applies.<sup>16</sup>

15 — On this point C refers to the parallels in the case-law of the European Court of Human Rights on Article 6(1) of the European Convention on Human Rights. The right to a fair trial applies *inter alia* to disputes relating to claims under civil law (‘civil’ rights). According to the European Court of Human Rights, disputes concerning State measures which concern parental responsibility also fall within the scope of application of Article 6(1), because they affect a legal relationship characterised by civil law. See *inter alia* judgment of the ECHR of 8 July 1987 in *W. v United Kingdom*, Application No. 9749/82, paragraph 78. For a review of the case-law of the European Court of Human Rights on the concept of civil rights, see Grabenwarter and Pabel in Grote and Marauhn (eds), *EMRK/GG*, 2006, chapter 14, paragraphs 13 to 15.

16 — To this effect, see V. Kress, *Internationale Zuständigkeit für elterliche Verantwortung in der Europäischen Union*, 2005, p. 49.

44. In this regard it does not matter whether parental responsibility is affected by a protective measure taken by the State or by a decision which is taken on the initiative of the person who has (or the persons who have) rights of custody. As the term ‘civil matters’ is to be interpreted autonomously, it can include measures which, under the domestic law of a Member State, are regarded as falling within public law.<sup>17</sup>

45. As the French Government correctly emphasised, recital 10 in the preamble to the regulation confirms that the interpretation of the term ‘civil matters’ is not intended to exclude from the regulation’s scope of application protective measures taken by the State which affect parental custody. Instead, the choice of this term takes into account the fact that the regulation does not apply to some areas of public law and criminal law which are not directed at regulating parental responsibility, such as social security or measures in matters of education and health, decisions on the right of asylum and on immigration, and measures taken as a result of criminal offences committed by children.<sup>18</sup>

46. Consideration of the legislative history confirms this interpretation of the term ‘civil matters’. Regulation No 1347/2000,<sup>19</sup> the

17 — Those involved in applying the law were expressly referred to this in the Practice Guide for the application of the new Brussels II Regulation (cited above, footnote 5), page 10.

18 — Article 1(3)(g) of Regulation No 2201/2003.

19 — Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ 2000 L 160, p. 19.

predecessor to Regulation No 2201/2003, concerned only civil proceedings relating to parental responsibility for the children of both spouses on the occasion of matrimonial proceedings (Article 1(1)(b) of Regulation No 1347/2000). The connection this required between the decision concerning parental responsibility and matrimonial proceedings meant that protective measures taken by the State were not within the scope of application of Regulation No 1347/2000.

47. Although the Commission wanted all decisions on parental responsibility to be covered, in its Proposal which led to Regulation 2201/2003<sup>20</sup> it initially retained the previous wording.<sup>21</sup> Thus, the Proposal did not clearly indicate whether protective measures taken by the State were intended to be brought within the regulation's scope of application. However, in its reasons for the Proposal the Commission explained that only certain protective measures in connection with the punishment of penal offences were to be left unaffected by the Regulation.<sup>22</sup> From this one could draw only the

inverse conclusion that other protective measures taken by the State were intended to be covered.<sup>23</sup> This lack of clarity was deliberately eliminated in the discussions in the Council by the alteration of Article 1(1) and the insertion of the positive and negative lists in Article 1(2) and (3) and of Recital 10.

48. A further aspect of the regulation's legislative history is the close substantive connection between Regulation No 2201/2003 and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children ('Child Protection Convention').<sup>24</sup>

49. In defining its scope of application, the regulation, as presently in force, shows clear parallels with the Child Protection Conven-

20 — COM(2002) 222 final/2 of 17 May 2002 (OJ 2002 C 203E, p. 155).

21 — Article 1 of the draft provided: '1. This Regulation shall apply to civil proceedings relating to: ...  
(b) the attribution, exercise, delegation, restriction or termination of parental responsibility.  
2. Notwithstanding paragraph 1 this Regulation shall not apply to civil proceedings relating to ...  
(b) measures taken as a result of penal offences committed by children.  
3. Other proceedings officially recognised in a Member State shall be regarded as equivalent to judicial proceedings.'

22 — COM(2002) 222 final/2, p. 6.

23 — See Kress (cited above, footnote 16), p. 44 f.

24 — Hague Conference on private international law, *Actes et documents de la XVIIIème session*, 1998, p. 14. Also available in English from the homepage of the Hague Conference: <http://hcch.net/upload/text34d.pdf>. By Council Decision of 19 December 2002 (OJ 2003 L 48, p. 1) the Member States were authorised to sign the Convention in the interests of the European Union, and have all done so. However, only eight Member States have ratified it. It appears that ratification is still blocked by the Gibraltar question (see J. Pirrung, 'Brüche zwischen internationaler und europäischer Rechtsvereinheitlichung — das Beispiel des internationalen Kindschaftsrechts in der Brüssel IIa-Verordnung', in *Internationales Familienrecht für das 21. Jahrhundert, Symposium zum 65 Geburtstag von Ulrich Spellenberg*, 2006, p. 89, at p. 91). The Child Protection Convention entered into force on 1 January 2002.

tion. Thus, the scope of application of both measures is based on a broad interpretation of parental responsibility. In addition, it is manifest that in the course of the Council's deliberations on the draft, the method of defining the scope of application of the regulation was brought closer to the Child Protection Convention, in that positive and negative lists were likewise inserted into Article 1(2) and (3) of the regulation, and these broadly correspond to the equivalent lists in Articles 3 and 4 of the Child Protection Convention.<sup>25</sup> There the Child Protection Convention expressly includes State measures in its scope of application: an example is placement (Article 3(e) of the Child Protection Convention) which, in his Explanatory Report to the Child Protection Convention,<sup>26</sup> Paul Lagarde even describes as a prototype of a measure of protection. In addition, measures taken as a result of penal offences committed by children are excluded from the Child Protection Convention (Article 4(i) of the Child Protection Convention).

50. Admittedly, as regards relations between the Member States, within its scope of application Regulation No 2201/2003 takes precedence over international conventions (see Articles 60 and 61 of the regulation). However, international instruments continue to apply between Member States and third countries. For that reason, the provisions of

the regulation and corresponding provisions in other conventions ought, so far as possible, to be interpreted in the same way, in order to avoid different results according to whether a case concerns another Member State or a third country.<sup>27</sup>

(c) Whether it is compatible with the legal basis of Regulation No 2201/2003 (Article 61 EC) for protective measures taken by the State to be included within the scope of application of the regulation

51. In conclusion, it may be mentioned that it is not incompatible with the legal basis of Regulation No 2201/2003 to include within its scope of application State protective measures which in some Member States are regarded as public law measures.

52. It is clear that the regulation's legal basis, namely Article 61(c) EC, enables measures to be enacted in the field of judicial cooperation only in *civil matters* within the meaning of Article 65 EC. The third indent of Article 65(a) EC provides that measures in this area include improving and simplifying the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases. However, the term 'civil matter' within the meaning of the above provisions of the EC Treaty is to be given an

25 — On this point see J. Pirrung, 'Internationale Zuständigkeit in Sorgerechtsachen nach der Verordnung (EG) Nr. 2201/2003', in *Festschrift für P. Schlosser*, 2005, p. 695, at pp. 696 f., and J. Pirrung in *Internationales Familienrecht für das 21. Jahrhundert* (cited above, footnote 22), p. 93.

26 — Available in English at <http://hcch.net/upload/exp134.pdf>; paragraph 23 of the version cited (on Article 3(e)).

27 — See J. Pirrung in: *Internationales Familienrecht für das 21. Jahrhundert* (cited above, footnote 24), p. 100.

autonomous Community law interpretation, like the same term in Regulation No 2201/2003. Accordingly, for the purposes of Article 61(c) and Article 65 EC ‘civil matters’ may equally include State measures which affect private law relationships such as the exercise of parental responsibility, even if corresponding measures are classified as measures of public law in some Member States.

### B — *The second question*

54. By its second question the Korkein Hallinto-oikeus seeks to have clarified whether the harmonised domestic rules of the Nordic countries, which permit direct enforcement and recognition of administrative decisions as a form of cooperation between administrative authorities, continue to be applicable to taking a child into care even where the relevant measures fall within the scope of application of Regulation No 2201/2003.

### 3. Interim conclusion

53. The preceding observations on Questions 1(a) and (b) lead to the conclusion that a decision relating to the immediate taking into care of a child and his or her placement in a foster family outside the home is to be regarded as a civil matter concerning the exercise of parental responsibility to which Regulation No 2201/2003 is therefore applicable. This applies even if the decision in question is, under the domestic law of the State of origin or of the State addressed, subject to public law. It follows that it is unnecessary to answer Question 1(c), as it arises only if placement but not taking into care falls within the regulation’s scope of application.

55. In this connection the national court refers to Article 59(2) of Regulation No 2201/2003. It provides that Finland and Sweden are to have the option of declaring that the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden comprising international private law provisions on marriage, adoption and guardianship, together with the Final Protocol thereto, will apply, in whole or in part, in their mutual relations, in place of the rules of the regulation. It wishes to ascertain whether this provision may be applied by analogy to cooperation between the Nordic countries in relation to transfer for the enforcement of measures concerning the taking into care and treatment.

56. However, as the parties who have made submissions on this question unanimously

emphasise, that would run counter to the principle of supremacy of Community law.<sup>28</sup> This principle obliges the authorities and courts of the Member States to disapply domestic law which conflicts with Community law.<sup>29</sup>

57. It would be otherwise only if the relevant provisions of Community law expressly permit derogations by the Member States. However, Article 59 of Regulation No 2201/2003 does not, however, contain any relevant enabling provision as regards national provisions in Finland and Sweden concerning transfer for enforcement of measures concerning the taking into care and treatment in the context of cooperation between Nordic countries.<sup>30</sup>

58. That Article 59(2)(a) of Regulation No 2201/2003 is an exception, and therefore to be interpreted narrowly, is itself enough to exclude its application by analogy. In addition, Article 59(2)(a) requires the Member States concerned to make a declaration on the application of derogating provisions, which is added to the Regulation as an annex and published in the *Official Journal of the European Union*.

28 — Case 6/64 *Costa v ENEL* [1964] ECR 585, at p. 593 et seq.

29 — Case 106/77 *Simmmenthal* [1978] ECR 629, at paragraphs 21 to 23.

30 — To this extent, the situation is different from that under the Child Protection Convention, Article 52 of which expressly permits the retention or enactment of uniform laws of a regional nature.

59. Declaration No 28 on Nordic Cooperation, made on the accession of Austria, Finland and Sweden, likewise does not permit the application of provisions derogating from Regulation No 2201/2003. Specifically, in this Declaration the Contracting Parties expressly record that Sweden and Finland, as members of the European Union, intend to continue, *in full compliance with Community law*, Nordic Cooperation amongst themselves as well as with other countries and territories.

60. Provided Regulation No 2201/2003 is temporally and substantively applicable, Finland and Sweden must apply the regulation as regards the recognition and enforcement of decisions relating to parental responsibility and must disapply any domestic provisions which derogate from them.

61. This conclusion may appear regrettable as regards the obviously well-developed administrative cooperation between Finland and Sweden which supports the welfare of children. However, in enacting Regulation No 2201/2003 the Member States have agreed certain uniform procedural standards, such as maintaining the exequatur requirement, which in turn protect the parties to the proceedings, as the Netherlands Government rightly emphasised.

C — *The third question*

62. The third question concerns the temporal scope of application of Regulation No 2201/2003. According to the transitional provisions in Article 64(2) the regulation applies to recognition and enforcement of judgments subject to three conditions:

- the judgment must have been given *after* the date of application of Regulation No 2201/2003,
- the proceedings resulting in the judgment must have been instituted *before* the date of application of Regulation No 2201/2003 but *after* the date of entry into force of Regulation No 1347/2000,
- the jurisdiction of the court which gave the decision must have been founded on rules which accorded with those provided for in the jurisdiction provisions of either Regulation No 2201/2003, Regulation No 1347/2000 or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

63. Under Article 72(1), although Regulation No 2201/2003 entered into force on 1 August 2004 its provisions — subject to some exceptions not relevant in the present case — were applicable only from 1 March 2005 (Article 72(2)). It follows that the regulation began to apply on 1 March 2005. Regulation No 1347/2000 entered into force on 1 March 2001.

64. Thus, the first requirement is that the judgment was given on or after 1 March 2005. The national court regards the order of the Länsrätt confirming the decision by the Social Welfare Board of 23 February 2005 as the judgment which is to be enforced. The date of the order was 3 March 2005, and thus after the date of application of Regulation No 2201/2003.

65. In principle, one could also regard the order of the Social Welfare Board of 23 February 2005 itself as ‘the judgment’. Article 2(4) provides that for the purposes of the regulation, ‘judgment’ includes a decision relating to parental responsibility, whatever it may be called. In addition, it follows from Article 2(1) that the term ‘court’ includes all the authorities with jurisdiction in the proceedings falling within the scope of the regulation pursuant to Article 1. Accordingly, administrative decisions too may, in principle, be recognised and enforced in another Member State on the basis of the regulation.

66. However, the relevant decision must be enforceable in the State of origin before it may be enforced by a court of another Member State by way of cooperation (Article 28(1) of Regulation No 2201/2003). It must at least have external consequences in order that it may be regarded as a judgment which has been given, and this is to be determined by the *lex fori*.<sup>31</sup> Since, under Swedish law, the effect and enforceability of the decision apparently depended on its being confirmed by the *Länsrätt*, it seems correct to regard the date of confirmation by the court as determinative for the purposes of Article 64(2) of the regulation. In any event, it is a matter for the national court to determine which is the enforceable decision under national law.

67. As regards the second requirement (see above, point 62), the national court proceeds on the footing that the proceedings were instituted in autumn 2004 when the Social Welfare Board initiated the investigation. By contrast, the Commission submitted that the proceedings were instituted only by the Social Welfare Board's application to the *Länsrätt* on 25 February 2005 for confirmation of its decision.

68. Article 16 of Regulation No 2201/2003 specifies only when a court is to be regarded

as seised, that is to say — in short — at the time when the document instituting the proceedings is lodged with the court, or if the document has to be served before being lodged with the court, at the time when it is served on the respondent. By contrast, the provision does not directly cover the case in which an authority acts on its own authority and takes measures to protect children. However, if the date of the relevant decision is not that of the order of the Social Welfare Board of 23 February 2005 but that of its confirmation by the *Länsrätt* on 3 March 2005, that would suggest, as the Commission submits, that for the purposes of Article 64(2) the proceedings should be regarded as instituted only by the Social Welfare Board's application to the *Länsrätt*.

69. Ultimately, however, the question need not be answered, because both the initiation of the investigation by the Social Welfare Board and the making of the application to the *Länsrätt* occurred before the date of application of Regulation No 2201/2003 and after the entry into force of Regulation No 1347/2000.

70. The third requirement is also satisfied. The provisions as to jurisdiction in force in Sweden at the time the proceedings were instituted correspond to those of Regulation No 2201/2003. The national provisions in force prior to the date of application of the regulation founded the jurisdiction of the authorities or, as the case might be, of the court on the permanent residence of the

31 — See Rauscher and Rauscher, *Europäisches Zivilprozessrecht* (2nd ed.), Munich, 2006, Article 64 of Brussels IIa Regulation, paragraph 9; M. Fleige, *Die Zuständigkeit für Sorgerechtsentscheidungen und die Rückführung von Kindern nach Entführungen nach dem Europäischen IZVR*, Würzburg, 2006, p. 114.

children in Sweden. Article 8(1) of Regulation No 2201/2003 contains a corresponding provision on jurisdiction.

71. Accordingly, the answer to be given to the third question is that Article 64(2) of Regulation No 2201/2003 is to be interpreted

as meaning that a judgment relating to parental responsibility given on 3 March 2005 in proceedings which were instituted after 1 March 2001 and before 1 March 2005 is to be recognised and enforced in accordance with Chapter III of Regulation No 2201/2003 if the jurisdictional provisions in force when the proceedings were instituted founded the authority's jurisdiction on the children's permanent place of residence, in the same way as Article 8(1) of the Regulation.

## V — Conclusion

72. On the basis of the foregoing considerations, I propose that the Court should answer the questions referred by the Korkein Hallinto-oikeus as follows:

- (1) Article 1(1)(b) in conjunction with letters Article 2(a) and (d) of Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, is to be interpreted as meaning that a decision relating to the immediate taking into



care of a child and his or her placement in a foster family outside the home is to be regarded as a civil matter concerning the exercise of parental responsibility to which Regulation No 2201/2003 is therefore applicable. This applies even if the decision in question is, under the domestic law of the State of origin or of the State addressed, subject to public law.

- (2) Provided Regulation No 2201/2003 is temporally and substantively applicable and does not expressly provide for any relevant exception, the Member States must not apply any domestic provisions which derogate from the regulation.
  
- (3) Article 64(2) of Regulation No 2201/2003 is to be interpreted as meaning that a judgment relating to parental responsibility given on 3 March 2005 in proceedings which were instituted after 1 March 2001 and before 1 March 2005 is to be recognised and enforced in accordance with Chapter III of Regulation No 2201/2003 if the jurisdictional provisions in force when the proceedings were instituted founded the authority's jurisdiction on the children's permanent place of residence, in the same way as Article 8(1) of the regulation.